

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Covad Communications Company	:	
	:	
Petition for Arbitration Pursuant to	:	00-0312
Section 252(b) of the	:	
Telecommunications Act of 1996 to	:	
Establish an Amendment for Line	:	
Sharing to the Interconnection	:	
Agreement with Illinois Bell	:	(Consolidated)
Telephone Company d/b/a	:	
Ameritech Illinois, and for an	:	
Expedited Arbitration Award on	:	
Certain Core Issues.	:	
	:	
Rhythms Links, Inc.	:	00-0313
	:	
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ARBITRATION DECISION ON REHEARING

DATED: January 31, 2001

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By the Commission:

I. INTRODUCTION

On April 26, 2000, Rhythms Links, Inc. ("Rhythms") and Covad Communications Company ("Covad") (collectively "Applicants") filed with the Illinois Commerce Commission ("Commission") separate petitions for arbitration seeking amendments to their interconnection agreements with Illinois Bell Telephone Company ("Ameritech Illinois"). Specifically, Rhythms and Covad sought amendments that would allow access to a new unbundled network element, the High Frequency Portion of the Loop ("HFPL"), pursuant to the FCC's *Line Sharing Order* (CC Docket Nos. 98-147 & 96-98) (Order Released August 10, 2000). These arbitrations were consolidated, and on August 17, 2000, this Commission entered its Arbitration Decision. On September 18, 2000, Ameritech Illinois filed an application for rehearing of the Arbitration Decision, and

on September 20, 2000, an application for rehearing was filed by Rhythms. On October 7, 2000, we entered an order granting rehearing on four distinct issues, two of which have been resolved by the parties.

The first remaining issue on rehearing was raised by Ameritech Illinois and concerns whether the Commission erred in ordering Ameritech to allow line card virtual collocation in its Project Pronto NGDLCs ("Project Pronto requirement"). Rhythms also adduced testimony relating to the Commission's decision not to allow Rhythms and Covad to physically collocate line cards in Ameritech Illinois NGDLC RTs, despite the fact that its application for rehearing did not raise the issue. Accordingly, that issue is not before the Commission. In a similar vein, Ameritech raised a number of arguments relating to the necessity of Applicants satisfying the "necessary" standard of Section 261(c) if their request is viewed as a request for the unbundling of a new UNE. The Commission has previously determined that the "impair" standard applies in this case because no party has asserted that any of the equipment being considered here is proprietary (a necessary predicate for the "necessary" standard to apply). No party has challenged this decision on rehearing and Ameritech's arguments on this point are deleted. The other remaining issue was raised by Rhythms, and concerns whether the negotiated non-recurring price for HFPL UNE cross connects agreed to by SBC and Covad as part of a negotiated global settlement between SBC and Covad, should be included in the instant agreement.

Direct Testimony on Rehearing was filed by Ameritech Illinois, Rhythms, Covad and Staff on November 21, 2000, Rebuttal Testimony on Rehearing was filed by all parties Rhythms and Staff on December 11, 2000, and Surrebuttal Testimony on Rehearing was filed by all parties on December 21, 2000. Evidentiary hearings were held January 3-5, 2001, and all parties filed Briefs on January 16, 2000. A Hearing Examiner's Proposed Order Arbitration Decision on Rehearing was served on January 22, 2000. Exceptions and Replies as received have been considered by the Commission in reaching the conclusions herein.

II. THE ARBITRATION DECISION'S PROJECT PRONTO REQUIREMENT

A. Commission's Original Conclusion on Project Pronto

The Commission concluded that Ameritech was required to provide line sharing over fiber-fed "Project Pronto" DLC architecture to CLECs simultaneously with such provision to its retail or affiliate operations. The Commission found that this requirement was technically feasible and necessary to promote the deployment of competitive advanced services in Illinois.

B. Ameritech Illinois' Position on Rehearing

Ameritech Illinois argues that the Commission should eliminate the Arbitration Decision's Project Pronto requirement for the following reasons: first, the requirement conflicts with the *UNE Remand Order* (CC Docket No. 96-98) (Order Released Nov. 5,

1999) and therefore is preempted under federal law; second, the necessary and impair tests of Section of 251(d)(2) of the Telecommunications Act of 1996 ("TA 96") have not been met; third, the requirement conflicts with the FCC's national policy framework and therefore is preempted by federal law; fourth, the requirement conflicts with two recent Federal Court Decisions (See *Iowa Utils Bd. v. FCC*, 120 F. 3d 753 (8th Cir. 1997) ("*IUB I*"), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*IUB II*"); *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000) ("*IUB III*") in that it forces Ameritech Illinois to affirmatively create new combinations of UNEs on behalf of CLECs; fifth, the requirements of Section 261(c) of TA 96 have not been met; sixth, the statutory test of Section 251(c)(6) TA 96 for the collocation of equipment has not been met; seventh, the requirement unlawfully requires Ameritech Illinois to build new facilities or provide superior quality service in violation of current caselaw; and eighth, the requirement is not sound from a technical and policy perspective.

1. Legal Arguments

First, Ameritech Illinois argues that the Arbitration Decision's Project Pronto UNE/line card collocation requirement conflicts with the *UNE Remand Order*. Ameritech Illinois explains that new Project Pronto UNE or UNEs include, among other things, the packet switching functionality of the Next Generation Digital Loop Carrier (NGDLC) and the OCD. The NGDLCs that Ameritech Illinois plans to deploy under Project Pronto digitize the data signals received over the copper subloop from a DSL subscriber and "packetize" those digitized signals into "cells" for transmission to the OCD at the Central Office. The OCD is an ATM switch. *Project Pronto Order*, ¶ 18. ATM switches are packet switches. *Id.*; see also *UNE Remand Order*, ¶ 303. The FCC held in the *UNE Remand Order* that an ILEC is not required to provide packet switching as a UNE as long as the ILEC allows CLECs to collocate their Digital Subscriber Line Access Multiplex (DSLAMs) in the ILEC's Remote Terminals (or meets other criteria), which Ameritech Illinois does. *UNE Remand Order*, ¶ 313; 47 C.F.R. 51.319(c)(4)-(5). Ameritech Illinois asserts that the FCC has "made an affirmative finding as to whether or not the [packet switching network element] satisfies the unbundling standards of the Act as clarified by the Supreme Court" (*UNE Remand Order*, ¶ 157) and held that in all but exceptional circumstances (that do not apply to Project Pronto), it does not.

Ameritech Illinois asserts that the Commission cannot ignore or nullify the FCC's packet switching determination by ordering the unbundling of the Project Pronto network, including the packet switching functionality of the OCD and the NGDLC. See *IUB II*, at 378 n.6. The FCC drew the line on packet switching in the *UNE Remand Order*, and this Commission is not free to erase or ignore it. Ameritech Illinois argues that the Arbitration Decision's Project Pronto UNE/line card collocation requirement is unlawful because, where the FCC has specifically determined that a network element does not meet the unbundling requirements of the Act and federal rules, its decision is the "national framework" that "draw[s] the lines to which [state commissions] must hew." *IUB II*, at 378 n.6.

Second, Ameritech Illinois argues that the Arbitration Decision's Project Pronto UNE requirement is unlawful because the necessary and impair standards of Section 251(d)(2) of the Act and FCC Rule 317 have not been met. Specifically, Ameritech Illinois asserts that, before a state commission can require a new UNE, it must conduct a "fact intensive" analysis that "consider[s] the totality of the circumstances," including market conditions and the availability of alternatives to the UNE, to determine whether, among other things, lack of access to the UNE will "materially" diminish CLECs' ability to provide the services they seek to offer. *UNE Remand Order*, ¶¶ 62, 142. Ameritech Illinois points out that *IUB II* makes clear that Section 251(d)(2) – and correspondingly FCC Rule 317 – places the burden of proof on the *requesting carrier* to affirmatively establish by objective, market-based evidence that the unbundling they seek satisfies the requirements of Section 251(d)(2). Ameritech Illinois further points out that the Supreme Court has held that, in order to satisfy this burden, a mere showing by the CLEC that a failure to unbundle would increase the CLEC's financial or administrative costs is not sufficient. *Id.* at 389-392.

Ameritech Illinois argues that neither Rhythms nor Covad have met this rigorous standard. Ameritech Illinois asserts that the only "evidence" presented in this rehearing is vague unsupported assertions by Rhythms and Covad that they will be competitively harmed, or will face unspecified increased costs (which the Supreme Court has held is insufficient to satisfy the burden of proof), if the Arbitration Decision's Project Pronto requirement is not retained. Ameritech Illinois asserts that the record contains none of the types of information necessary to conduct the "fact intensive" review required by law. Ameritech Illinois asserts that the only relevant evidence shows that Ameritech Illinois' planned deployment of DSL-related Project Pronto facilities will offer CLECs with an *additional option or platform* for offering DSL services to end-users by, among other things, providing CLECs with wholesale Broadband Services for data service and for combined voice and data services, both at UNE rates. See *Project Pronto Order*, App. A. Those services, Ameritech Illinois asserts, will enable Rhythms, Covad and other CLECs to make use of facilities and to access features and functions that are not required to be unbundled at all, and will make them available much more quickly than would otherwise be possible, thereby enhancing and accelerating the CLECs' ability to provide competitive advanced services. See *Project Pronto Order*, ¶¶ 2, 23, 41-43, 45-46.

More specifically, Ameritech Illinois argues that there is a fundamental lack of evidence needed for this Commission to perform, and to satisfy, the type of "necessary and impair" analysis required by the Supreme Court's *IUB II* decision, as well as the analysis required by the FCC's *UNE Remand Order*. For example, Ameritech Illinois points out that Rhythms and Covad failed to provide any evidence regarding their costs; the costs of the multiple existing options available to them for providing DSL services to end users; their retail prices; or the prices or cost structure of the Advanced Services market in which they compete, which includes not only advanced services provided through DSL technologies but advanced services provided through other technologies (and hence other potential sources of supply), such as cable modem, direct broadcast satellite, and wireless broadband services. Ameritech Illinois also points out that

Rhythms and Covad's assertions (and Staff's assertions) about the purported shortcomings of the existing options for providing DSL services are not only unsupported by objective or quantitative facts but are irrelevant, because Ameritech Illinois has yet to deploy Project Pronto. In other words, Ameritech Illinois argues, the proper starting point for performing the "impair" analysis required by Section 251(d)(2) of the Act is the advanced services market as it exists *today*. Ameritech Illinois points out that its planned deployment of DSL-related Project Pronto facilities will not adversely affect any of the *existing* options available to CLECs today for providing DSL services to end-users; instead, it will provide CLECs with an *additional* option or platform for providing DSL services, through use of the Broadband Services offering, that otherwise would not exist.

Third, Ameritech Illinois argues that the *Project Pronto Order* provides the current national framework for promoting advanced services deployment and competition, and that the Arbitration Decision takes an approach that is directly at odds with the approach in that order. Ameritech Illinois explains the background leading to this decision. SBC originally considered allowing both its ILECs' Advanced Services Affiliates and unaffiliated CLECs to own and control their own line cards in the Project Pronto NGDLCs. After discussing this proposal with CLECs, however, SBC concluded that the administrative and operational expense and technical issues involved with such a scenario would create inefficiency and add unreasonable costs and delays to its plans to deploy advanced services. *SBC Waiver Request* at 2-3; *Project Pronto Order*, ¶ 22 n.59. SBC therefore proposed to have its ILECs own the NGDLC line cards and, to ensure that CLECs remained fully able to compete, to provide all carriers, including the SBC ILECs' Advanced Services Affiliate, access to wholesale Broadband Service offerings over the Project Pronto network for both data services only, and for combined voice and data services. *SBC Waiver Request* at 5-6. SBC also made additional commitments to facilitate collocation in its ILECs' RTs, to preserve copper transmission facilities, and to host industry collaboratives to address competitive access to remote terminals, all of which were cited by the FCC as actions likely to promote advanced services competition. *Project Pronto Order*, ¶¶ 2, 34-40.

Ameritech Illinois states that the FCC has now determined that allowing the SBC ILECs to own and control line cards used with Project Pronto NGDLCs is in the public interest and is the best means for promoting advanced services deployment and competition, as long as the SBC ILECs offer CLECs end-to-end wholesale Broadband Services over the Project Pronto facilities and satisfy other pro-competitive commitments. *Project Pronto Order*, ¶¶ 1-2. Specifically, the FCC emphasized that the SBC ILECs' commitments, made in exchange for being allowed to own the line cards, would (1) "speed the deployment of ADSL service availability to 77 million customers" and (2) give CLECs an "immediate opportunity to compete against SBC in the mass market" and "enable [CLECs] to compete more effectively against SBC by differentiating their product offerings." *Project Pronto Order*, ¶ 23.

Ameritech Illinois further explains that, after spending several months soliciting CLEC input and developing an exhaustive record on the issues, the FCC approved

SBC's proposal as serving the public interest. Ameritech Illinois states that the FCC reached this conclusion even though it knew that a denial of SBC's request would allow CLECs to own and collocate line cards to the extent that SBC's Advanced Services Affiliates did so, and even though CLECs, including Rhythms, had clamored to be allowed to own and collocate such line cards. *Project Pronto Order*, ¶ 22 n.59; Comments of the DSL Access Telecommunications Alliance ("DATA"), CC Docket 98-141 (FCC filed Mar. 3, 2000) at 15. The FCC concluded that any competitive risk from allowing the SBC ILECs to own and control the line cards was more than offset by the pro-consumer and pro-competitive benefits of SBC's Broadband Service offerings and other commitments. *Project Pronto Order*, ¶¶ 1, 23. As the FCC stated, "we expect consumers will benefit not only from a more rapid deployment of advanced services, but from the increased choices that stem from the competitive safeguards contained in SBC's proposal." *Id.*, ¶ 2. Further, the FCC found that "[t]he immediate deployment of advanced services to consumers in SBC's regions that will occur as a result of SBC's proposal provides a significant benefit that we believe must be considered in our public interest analysis. In particular, we find that SBC's proposal should affirmatively and identifiably promote the rapid deployment of advanced services in a pro-competitive manner, thereby serving the goals of section 706." *Id.*, ¶ 23 (emphasis added).

Ameritech Illinois states that the FCC recognized the benefits to CLECs of SBC's commitments:

Our approval of SBC's request subject to its pro-competitive commitments . . . paves the way for Rhythms and other carriers to compete for those customers [who would not be able to receive DSL service without Project Pronto]. SBC's commitments will facilitate Rhythms' access to remote terminals and enable Rhythms and others to differentiate their product offerings from those of SBC's Advanced Services Affiliate.

Id., ¶ 28.

The FCC emphasized that the SBC ILECs' commitments will "help ensure that consumers will have a wide array of choice[s]" because SBC will "mak[e] available all features, functions, and capabilities of the equipment installed in remote terminals at just, reasonable, and nondiscriminatory rates, terms, and conditions." *Id.*, ¶ 42. "By unleashing the full potential of the [Project Pronto] equipment," the FCC found, "SBC's commitment will help competitive LECs provide innovative, exciting new services" and enable CLECs to "compete more effectively against SBC by differentiating their product offerings." *Id.*, ¶ 45.

Moreover, Ameritech Illinois argues that the Arbitration Decision's Project Pronto requirement directly conflicts with the FCC's finding that the SBC ILECs' commitments "must be considered in [an agency's] public interest analysis" and that those commitments "serv[e] the goals of Section 706" by "promoting the rapid deployment of advanced services in a pro-competitive manner." *Project Pronto Order*, ¶ 23. Ameritech Illinois asserts that Rhythms' and Covad's assertion that the SBC ILECs' commitments

– which are now enforceable conditions of an FCC Order – are somehow “illusory” or insufficient also conflicts with the FCC’s policy decision to grant SBC’s waiver request. The FCC went out of its way to grant a waiver from its merger conditions and allow the SBC ILECs to own line cards and other equipment solely because of the public interest benefits of SBC’s commitments. Ameritech Illinois asserts that the Arbitration Decision fails to account for SBC’s commitments, the FCC’s weighing of policy factors, and the FCC’s conclusion as to the best way to promote advanced services deployment. Accordingly, Ameritech Illinois concludes that the Arbitration Decision’s Project Pronto UNE/line card collocation requirement is not consistent with the “national policy framework” on which it presumably will seek to rely.

Ameritech Illinois further argues that, because the Arbitration Decision’s Project Pronto requirement clashes head on with the FCC’s *Project Pronto Order*, it is preempted under established Supreme Court doctrine. Ameritech Illinois explains that, under well established principles of law, state regulation is preempted where it “stands as an obstacle to the accomplishment of the full purposes and objectives of Congress’ — whether that ‘obstacle’ goes by the name of ‘conflicting; contrary to;...repugnance; difference; irreconcilability; inconsistency; violation; curtailment; ...interference,’ or the like.” *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913, 1921 (2000) (ellipses in original) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). As the FCC recently noted, “[a]mong the fundamental goals of the Telecommunications Act of 1996 . . . is the promotion of innovation, investment and competition among all participants and for all services in the telecommunications marketplace, including advanced services.” *In the Matter of Deployment of Wireless Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, FCC 99-413 (rel. December 23, 1999) (citing Joint Statement of Managers, S. Conf. Rep. 104-230, 104th Cong. 2d Sess 1 (1996)). Ameritech Illinois argues that the Arbitration Decision’s Project Pronto requirement clearly stands “as an obstacle to the accomplishment of the purposes and objectives of Congress” and is preempted.

Ameritech Illinois also adds that, even if the FCC had not already established an applicable national framework, there would be strong policy reasons for this Commission not to rush into any decisions that would require the unbundling of the Project Pronto network and the forced collocation of line cards. Specifically, Ameritech Illinois points out that those issues fall within the scope of pending rulemakings at the FCC. *Collocation FNPRM*, CC Docket 98-147. *NGDLC FNPRM*, CC Docket 96-98. See *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket 96-98, CC Dockets 98-147 and 96-98 (rel. Aug. 10, 2000) (“*Advanced Services Order*”).

Fourth, Ameritech Illinois argues that the Arbitration Decision’s Project Pronto line card virtual collocation requirement would unlawfully force Ameritech Illinois to affirmatively create new combinations of UNEs on Rhythms’ and Covad’s behalf.

Specifically, Ameritech Illinois would be required to combine the CLECs' NGDLC line cards with an unbundled copper subloop and an unbundled OCD/NGDLC/lit fiber combination in order to create an end-to-end combination of network elements capable of supporting DSL services. This requirement, Ameritech Illinois asserts, directly violates the Eighth Circuit's holdings in *IUB I* and *IUB III* that incumbent LECs cannot be forced to affirmatively combine UNEs for CLECs.

Ameritech Illinois contends that the federal District Court for the Western District of Michigan's decision on December 5, 2000, in *Verizon North, Inc. v. Strand*, File No. 5:98-CV (W.D. Mich. Dec. 5, 2000) confirmed that the Eighth Circuit's holding in *IUB I* and *IUB III* is binding on the FCC and the states. In that case, the court overturned a state commission decision ordering Verizon North to offer unbundled network elements as combinations of platforms at a CLEC's request. Relying on the Eighth Circuit's decision in *IUB III*, the court held that any state requirement that an ILEC combine UNEs for CLECs is preempted by the Act. Specifically, the court rejected the Michigan commission's theory that *IUB III* "does not prohibit the combination of unbundled network elements, but rather only holds that combinations are not required by the FTA," finding that this argument rested on a "mistaken interpretation" of the law. *Verizon North*, slip. op. at 13. The court then held:

Under the FTA it is the duty of requesting carriers, not the incumbent LECs, to combine the elements. *Iowa Utilities III* makes it clear that the FCC cannot insert a bundling requirement consistent with the terms of the FTA. *For the same reasons the state is precluded from imposing such a requirement.* Accordingly, the Court finds that the MPSC's order that Verizon providing bundling at the behest of competitive LECs *conflicts with and is preempted by the FTA.* *Id.* at 13-14 (emphasis added).

For this same reason, Ameritech Illinois argues that the Commission must eliminate the Project Pronto requirement from the Arbitration Decision. That requirement, Ameritech Illinois asserts, would require Ameritech Illinois to create new combinations of network elements in violation of the Act. Ameritech Illinois points out that the Arbitration Decision's line card virtual collocation requirement is *not* like virtual collocation at a central office, where the CLEC connects its *network* to a pre-existing Ameritech Illinois UNE or UNE combination. Rather, the Arbitration Decision's requirement requires Ameritech Illinois to affirmatively combine its network elements with a CLEC network element to create a new combination of network elements that does not pre-exist in Ameritech Illinois' network.

Fifth, Ameritech Illinois states that a state commission can impose new collocation requirements, if at all, only if it first determines that such requirements satisfy Section 251(c)(6). Section 251(c)(6) allows collocation of only such equipment as is "necessary for interconnection or access to unbundled network elements." 47 U.S.C. 251(c)(6). Ameritech Illinois argues that the Arbitration Decision's Project Pronto requirement violates Section 251(c)(6) of the Act. Ameritech Illinois argues that this standard is not met because the ADLU line card is not a piece of equipment appropriate

for collocation, and collocation of ADLU cards is not *necessary* for CLECs to interconnect with Ameritech Illinois' network or access UNEs.

More specifically, Ameritech Illinois argues that this standard is not met because the line card is not a piece of equipment appropriate for collocation. Ameritech Illinois asserts that the FCC's rules require the collocation of only complete items of equipment. In its *Advanced Services Order* (at ¶ 28), the FCC described the equipment eligible for collocation as including DSLAMS, routers, ATM multiplexers, and remote switching modules. In addition, section 51.323(b) of the FCC's rules, which addresses collocation, describes the equipment that can be used for interconnection and access to unbundled network elements as follows:

(1) Transmission equipment including, but not limited to, optical terminating equipment and multiplexers, and

(2) Equipment being collocated to terminate basic transmission facilities pursuant to §§ 66.1401 and 64.1402 of this chapter as of August 1, 1996.

(3) Digital subscriber line access multiplexers, routers, asynchronous transfer mode multiplexers, and remote switching modules.

47 C.F.R. § 51.323(b). In every case, the FCC cites complete items of network equipment, not piece-parts or sub-components that make up these complete items of network equipment. This, Ameritech Illinois argues, demonstrates that the FCC does not consider such piece-parts or sub-components to be equipment eligible for collocation.

Ameritech Illinois asserts that a line card is not a piece of equipment appropriate for collocation, because it is only a piece-part or sub-component of a complete item of equipment. Specifically, a line card is not a complete NGDLC. Rather, the line card is merely a sub-component of an NGDLC, with no stand-alone functionality until it is integrated with the rest of the software and hardware in the NGDLC system. Indeed, a line card is a "circuit pack" or "plug-in unit" that is only a piece-part or sub-component of the complete NGDLC RT equipment unit. The complete NGDLC physically consists of line cards; additional cards that provide common functions for multiple line cards; hardwired equipment such as the shelves, connectors, and wiring that house and interconnect all of the line cards and common cards; and the system software that makes all of the NGDLC RT sub-components operate as a complete equipment unit. More specifically, the type of Project Pronto NGDLC line card currently available from Alcatel, the manufacturer of most of the Project Pronto NGDLCs that Ameritech Illinois is deploying, is the ADLU card. The ADLU card is inserted into a shelf within a complete NGDLC RT equipment unit. This ADLU card contains some of the electronic circuitry that enables the NGDLC to perform the various signal-conversion and multiplexing functions for an end user's ADSL signal. The ADLU card cannot perform any of these functions by itself, as it is only a piece-part or sub-component of the overall NGDLC RT equipment unit.

Ameritech Illinois points out that the FCC's *Project Pronto Order* (at n. 11) agrees with the characterization of an ADLU card as just a piece-part, stating that the

plug-in ADLU Card is only one component of an NGDLC system. An NGDLC system typically contains several 'channel bank assemblies,' which are multiplexers used to provide service to end users. In each channel bank assembly, a carrier 'plugs in' cards that are used to provide specific telecommunications services. ... The ADLU Card is a plug-in card used to provide ADSL service from an NGDLC system. The ADLU Card works in conjunction with other plug-in cards and software to provide such service. In addition to the channel bank assemblies and the associated plug-in cards, DLC systems (including NGDLC systems) also contain a common control assembly that contains multiplexing, power, and other capabilities.

Ameritech Illinois argues that while the FCC's *Project Pronto Order* (at ¶ 14) stated that the ADLU card is the functional equivalent of a DSLAM, the ADLU card is still not a complete item of equipment allowed for collocation.

In addition, Ameritech Illinois argues that the requirements of Section 251(c)(6) are not met because collocation of ADLU cards is not necessary for CLECs to interconnect with Ameritech Illinois' network or access UNEs. Ameritech Illinois asserts that the ADLU card is unable to access any of Ameritech Illinois' UNEs at an RT site, or provide interconnection between Ameritech Illinois' network and a CLEC's network for the mutual exchange of traffic. Ameritech Illinois states there are only two Ameritech Illinois UNEs that *may* be accessible to a CLEC at an RT site. The first is unbundled dark fiber. Unbundled dark fiber is available at an RT site only if the RT is fed by fiber cable, and if any of the fiber strands are spare. The second is unbundled copper distribution subloops, including the full subloop or just the high frequency portion of the subloop. These unbundled subloops are available at an RT only if the CLEC's collocated equipment is cabled to the nearest cross-connect access point to those subloops (*e.g.*, the SAI cabinet), or to the "engineering controlled splice" referred to in Ameritech Illinois' voluntary commitments adopted in the *Project Pronto Order* (at ¶ 61). Ameritech Illinois states that a CLEC cannot obtain access to either of the UNEs by placing an ADLU card in Ameritech Illinois' NGDLC RT equipment. The ADLU card is simply not capable of providing access to any UNE. As previously explained, the ADLU card is only a sub-component of the complex system of hardware and software that collectively make up the complete functionality of a NGDLC. In fact, the ADLU card is merely one sub-component of one physical part (*i.e.*, the Project Pronto NGDLC) of the Project Pronto network. Further, there are no means to physically cross-connect the ADLU card to any UNE at the RT. Instead, the ADLU card can only be physically inserted into a slot within the NGDLC. In any event, even if it were able to access UNEs or interconnect two carriers' networks for the exchange of traffic, the ADLU card is *not* necessary for performing these tasks. In other words, access to the dark fiber and

copper subloop UNEs at the RT site (or interconnection) neither involves nor requires the CLECs' use or ownership of the ADLU card.

Sixth, *Ameritech Illinois* first posits that the Arbitration Decision would require *Ameritech Illinois* to install new equipment in violation of IUB I and IUB III because it would require *Ameritech Illinois* to build new facilities or provide superior quality service to CLECs, in violation of the Eighth Circuit's decisions in IUB I and IUB III. See *Iowa Utils. Bd. v. FCC*, 120 F. 3d 753 (8th Cir. 1997) ("*IUB I*"), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*IUB II*"); *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000) ("*IUB III*"). *Ameritech Illinois* asserts that the Alcatel LiteSpan 2000 equipment that *Ameritech Illinois* principally plans to deploy with Project Pronto does not perform wave division multiplexing. Rather, *Ameritech Illinois* would have to purchase and install additional equipment in order to provide such functionality. Nor does that NGDLC equipment, as *Ameritech Illinois* plans to deploy it, include software necessary to provision different ATM quality of service classes ("QoS") than the quality of service ATM offerings that *Ameritech Illinois* plans to deploy. *Ameritech Illinois* argues that, if the Arbitration Decision requires *Ameritech Illinois* to deploy a certain type of equipment or software associated with Project Pronto which is *different* from what *Ameritech Illinois* plans to deploy, or to have *Ameritech Illinois* add additional equipment or software to the Project Pronto architecture that it is not planning to add, the requirement would violate the Eighth Circuit's decisions in *IUB I* and *IUB III*.

2. Technical/Policy Arguments

Ameritech Illinois argues that there are also numerous technical and policy reasons why the Commission should eliminate the Arbitration Decision's Project Pronto requirement. From a technical perspective, *Ameritech Illinois* asserts that it is not technically feasible to unbundle this network architecture, because of the manner in which the components of the architecture interconnect and interwork with one another. Among other things, *Ameritech Illinois* asserts that it is not technically possible to unbundle lit fiber—which carries numerous end-users' telecommunications traffic—from the end-user customer "side" of the ATM switch at the Central Office, the OCD. This means that the Arbitration Decision's original requirement would require *Ameritech Illinois* to unbundle the pre-existing combination of the NGDLC at the RT, the lit fiber running between the NGDLC and the OCD, and the OCD itself – which, as noted above, would directly violate the FCC's determination that packet switching functionality is not subject to unbundling (except in limited circumstances not applicable here). In part because of this technical limitation, *Ameritech Illinois* is making available to CLECs end-to-end wholesale Broadband Services, running from the end user's premises to *Ameritech Illinois*' central offices, for incorporation into the CLECs' own DSL services for their individual end users. These Broadband Services provide CLECs with the full advanced services functionality of the equipment that *Ameritech Illinois* plans to actually deploy under Project Pronto.

In addition to the technical infeasibility of unbundling certain Project Pronto network elements, *Ameritech Illinois* argues that a host of operational and technical

problems will result if CLECs are allowed to own or designate and virtually collocate Project Pronto line cards and, more importantly, that those problems will discourage and potentially remove the necessary economic basis for Ameritech Illinois' further deployment of DSL-related Project Pronto facilities in Illinois. One of the most serious operational problems is the premature exhaust of the NGDLC system itself—both in terms of physical capacity limitations and bandwidth capacity limitations. In addition, Ameritech Illinois asserts that a number of serious provisioning and maintenance problems would result if CLECs were permitted to own or designate and virtually collocate their own ADLU line cards.

Ameritech Illinois asserts that, although the Arbitration Decision recognizes that these operational and technical problems would occur if CLECs were allowed to *physically* collocate Project Pronto NGDLC line cards (and therefore reject the CLECs' request for such physical collocation), it fails to recognize that these same operational problems would exist even if CLECs were allowed only to virtually collocate line cards. Ameritech Illinois asserts that CLEC collocation (whether physical or virtual) of Project Pronto NGDLC line cards will create numerous operational problems, introduce inefficiencies into Ameritech Illinois network, and cause Ameritech Illinois to incur substantial additional costs, none of which would exist if Ameritech Illinois were simply allowed to own the line cards, as authorized by the FCC's *Project Pronto Order*. Ameritech Illinois asserts that the operational problems associated with the Arbitration Decision's Project Pronto requirement would so dramatically change the economics of Ameritech Illinois' planned deployment of DSL-related Project Pronto facilities that Ameritech Illinois might be forced to forego the further deployment of those facilities in Illinois altogether. In fact, Ameritech Illinois, in its Brief, indicated that, given the high degree of regulatory uncertainty surrounding this issue create by the HEPO in Docket No. 00-0393, Ameritech Illinois has suspended further deployment of wholesale DSL-related Project Pronto facilities in Illinois. Ameritech Illinois adds that, to the extent that it reflects the Commission's regulatory approach to efforts by an ILEC to invest in its network to offer new services and enter into new markets, the Arbitration Decision's line card virtual collocation requirement would have a chilling effect on similar investments by Ameritech Illinois and other ILECs, both now and in the future.

Addressing the operational problems more specifically, Ameritech Illinois argues that allowing CLECs to own or control and collocate Project Pronto ADLU line cards would result in inefficient use of the Project Pronto facilities on the end-user side of the network, which ultimately could cause premature exhaust of the NGDLC system. Ameritech Illinois states that each type of NGDLC has a limited number of physical slots in which to place these line cards. Each NGDLC is planned and deployed with enough slot capacity to serve customers in a specific geographic area. In the Project Pronto NGDLCs, equipment used by Ameritech Illinois, the ADLU card has multiple ports for customer service (*i.e.*, each port serves a separate end user). Each line card slot is wired to an SAI to accommodate the total number of ports (*i.e.*, end users) that will be served by that ADLU line card and slot. When a carrier other than Ameritech Illinois owns or controls a line card for one end user, the entire port capacity of that card slot and the associated copper feeder pairs become unavailable for use by any other CLEC.

The Alcatel NGDLCs that Ameritech Illinois is deploying in the Project Pronto architecture are designed and cabled to the SAI for four ports per ADLU line card. Therefore, if a CLEC were allowed to own or control the ADLU line card and used that card to serve one end-user customer, 75% of that slot capacity and associated cable pairs would become unavailable to other CLECs to serve other DSL end-users. This condition, Ameritech Illinois asserts, would only be exacerbated if multiple CLECs were permitted to own and place their own line cards in the Project Pronto NGDLC RT equipment. The capacity of the Project Pronto NGDLC equipment would exhaust much sooner compared to the existing arrangement established by the FCC's *Project Pronto Order*, under which Ameritech Illinois owns the line cards, which allows all of the NGDLC ports to be shared by all of the CLECs.

In addition to physical exhaust of the slots in the NGDLC system, Ameritech Illinois argues that CLEC ownership and collocation of line cards would increase the risk of premature exhaust of the system's bandwidth. Ameritech Illinois is currently offering UBR (ubiquitous bit rate) quality of service over the Project Pronto DSL-related facilities, and its plans for deploying Project Pronto (including the software that is plans to deploy in Project Pronto NGDLCs) assume extensive use of the UBR quality of service. Ameritech Illinois chose to deploy UBR because UBR permits all customers to have an equal chance at the bandwidth resources of the NGDLC, and provides the most efficient use of the shared bandwidth of the NGDLC RT, *i.e.*, it provides access to that shared bandwidth to the greatest number of customers. Ameritech Illinois asserts that, unlike other QoS classes, UBR is ideally suited to serve the mass market, as Project Pronto was designed to do. More specifically, Ameritech Illinois asserts that UBR allows more customers to be assigned over the NGDLC and the shared fiber facility than could be assigned under any other quality of service class.

Ameritech Illinois explains that with UBR QoS the entire bandwidth is available to all customers on a first-come, first-served, "best efforts" basis. However, with CBR (constant bit rate) or VBR (variable bit rate) QoS, even though the total amount of bandwidth would remain the same, portions of the bandwidth would be dedicated to certain customers to the exclusion of UBR customers, thereby leaving UBR customers with less bandwidth to share. In light of these differences, Ameritech Illinois asserts, it is clear that implementing CBR or VBR QoS on Project Pronto DSL-related facilities would result in a number of adverse consequences on those facilities. More specifically, with CBR and VBR QoS, the facility carrying the DSL signal could exhaust the bandwidth capacity of the OC3c before the ports exhaust, which in turn could lead to a negative service impact on those customers using UBR. Such inefficient use of Project Pronto NGDLC facilities, Ameritech Illinois asserts, would make no sense, would create the need for additional capital investments sooner than would otherwise be necessary, and also could result in delays in providing service to end-user customers associated with the provisioning and installation of additional (and otherwise unnecessary) NGDLC facilities. Ameritech Illinois points out that it is only Ameritech Illinois, and no other party, that would bear the risk that these additional (and otherwise unnecessary) investment costs would become obsolete or otherwise stranded.

Ameritech Illinois asserts that the capacity of the lit fiber running between the NGDLC and the OCD cannot be increased merely by changing the ADLU line card in the Litespan equipment (either the Litespan 2000 NGDLC or the Litespan 2012 NGDLC). Nor would changing the common card that converts the DSL signals from electrical to optical increase the available DSL bandwidth. Am. Ill. Ex. 7.0 (Keown) at 15-16. Although Rhythms and Covad assert that there are different ways for Ameritech Illinois to increase bandwidth across the Project Pronto OCD-to-NGDLC fiber system (purportedly including deploying additional RTs; deploying more Litespan 2012 systems instead of Litespan 2000 systems; purchasing additional equipment to perform wave division multiplexing; and unchaining channel banks from the OC3c), Ameritech Illinois asserts that these options are either technically or economically unattractive to it.

The next complication resulting from CLEC collocation of line cards identified by Ameritech Illinois relates to the provisioning process. Specifically, Ameritech Illinois claims it would have to maintain a record of which slots, in which RTs, in which wire centers were dedicated to which CLECs. The CLECs' provisioning systems would also have to inventory, assign, and track the use of individual slots on individual cards in individual RTs in individual wire centers. Ameritech Illinois claims that exchanging and recording this CLEC slot/port assignment information between the two companies could complicate and very likely delay the provisioning intervals for new service orders. Ameritech Illinois asserts that when a new ADLU card was needed to work a new service order, the CLEC would have to physically ship a card to Ameritech Illinois so that Ameritech Illinois could place the card into the NGDLC. Ameritech Illinois claims that having to properly identify these types of new service orders and having to physically obtain the cards from the CLECs would only complicate and very likely delay the service provisioning process.

Ameritech Illinois also explains that CLEC line card collocation in Project Pronto NGDLCs will create serious problems and complications in its repair and maintenance processes. Ameritech Illinois asserts that the CLECs would have to provide Ameritech Illinois with spare line cards so that defective line cards could be replaced promptly. In addition, CLECs would have to identify to Ameritech Illinois the locations of its ADLU cards whenever the manufacturer initiated product modifications or upgrades. Tracking these maintenance spares, Ameritech Illinois asserts, would be unduly burdensome, and would become particularly onerous if multiple CLECs owned multiple types of line cards. In other words, Ameritech Illinois' technicians would be required to identify the owner of a defective line card or a line card to be upgraded, determine whether the owner had provided a spare, locate that spare, or place a call or an order to the owner to provide a spare. This, Ameritech Illinois asserts, could increase the repair interval for the end user's POTS or data service, which would mean longer out-of-service conditions, greater customer dissatisfaction, and additional customer complaints to this Commission.

Given these problems, Ameritech Illinois argues that the Arbitration Decision's Project Pronto requirement, if upheld, threatens to force Ameritech Illinois to deploy and use its DSL-related Project Pronto facilities in a manner that it did not intend and, more

importantly, in a manner that would be costly and inefficient. Ameritech Illinois explains that, although Ameritech Illinois has started deployment of Project Pronto DSL-related facilities in Illinois, it has not yet done so on a widespread or significant basis. Accordingly, the Arbitration Decision's NGDLC line card virtual collocation requirement will have much less of an impact on Ameritech Illinois' *existing* network than it will have on Ameritech Illinois' decision whether to invest in the further deployment of DSL-related Project Pronto facilities in Illinois. Ameritech Illinois asserts that the type of investment that Ameritech Illinois plans to make in these DSL-related Project Pronto facilities only makes sense when the investing company has the ability to configure its offering in the most efficient way possible and obtain a market-required return on the investment. Indeed, one of Ameritech Illinois' incentives for investing in Project Pronto is the efficiencies that can be gained in the Project Pronto network. The Arbitration Decision, Ameritech Illinois argues, improperly requires Ameritech Illinois to invest in a manner that suits the CLECs' business plans, regardless of the financial consequences to Ameritech Illinois and its investors.

Ameritech Illinois also argues that introducing inefficiencies into the network (as the Arbitration Decision's Project Pronto requirement would do) would increase Ameritech Illinois' cost of deploying these facilities and, as a result, the prices of the Broadband Service, or of the new Project Pronto UNEs provided in lieu of the Broadband Service, would increase. The increased deployment costs not only would increase Ameritech Illinois' investment risk, it also may, by virtue of the resulting higher pricing, make the Broadband Service and new Project Pronto UNEs less attractive to CLECs. The higher prices may cause fewer CLECs to purchase the UNEs or the service, which, in turn, means that Ameritech Illinois would run a higher risk of being unable to recover its cost of deploying these facilities.

Ameritech Illinois asserts that this problem is not resolved by the fact that Ameritech Illinois still would be able to charge TELRIC prices for the Broadband Service or the new Project Pronto UNEs, albeit higher TELRIC prices. As a preliminary matter, Ameritech Illinois asserts, the current TELRIC methodology does not necessarily guarantee that Ameritech Illinois would recover the additional deployment costs that it would incur under the Arbitration Decision. As Ameritech Illinois and other ILECs have argued, the FCC's TELRIC methodology does not permit an ILEC to recover all of its actual costs, an issue that is currently pending before the U.S. Supreme Court.

Even assuming that Ameritech Illinois were permitted to establish Broadband Services and UNE prices at a level that would provide it with an *opportunity* to recover all of the increased costs that would flow from the Arbitration Decision's Project Pronto requirement, Ameritech Illinois argues that there is still a strong likelihood that Ameritech Illinois would not recover its costs. Ameritech Illinois states that cost recovery pends upon the number of CLECs purchasing the new Project Pronto UNEs or the Broadband Service. Ameritech Illinois will not recover its costs unless CLECs actually purchase the UNEs or the service, and CLECs bear no obligation or requirement to do so. Ameritech Illinois asserts that, if significant numbers of CLECs

decide not to order the UNEs or the service at all, Ameritech Illinois' investment would be stranded.

C. Rhythms/Covad's Position

Rhythms and Covad argue that this Commission should retain the Arbitration Decision's Project Pronto NGDLC line card virtual collocation requirement. *First*, Rhythms and Covad assert that the Commission has authority under federal and state law to determine that Ameritech Illinois' Project Pronto facilities must be provided as UNEs for "line sharing." With respect to federal law, Rhythms and Covad assert that the FCC has acknowledged the role of state commissions in implementing the Act. Rhythms and Covad assert that the FCC reconfirmed states' authority to identify UNEs in addition to those included on the FCC's national list of UNEs in its *UNE Remand Order*. Finally, Rhythms and Covad assert that Ameritech has adduced no additional evidence that would require the Commission to overturn its previous decision.

Rhythms and Covad assert that the FCC's *Line Sharing Order* empowers state commissions to look beyond the four corners of the *Line Sharing Order* when adopting measures implementing the mandates of the Order. Rhythms and Covad concede that the *Line Sharing Order* specifically discusses only the HFPL UNE, that is, line sharing over the copper portion of the local loop. However, Rhythms and Covad contend that the Order does not preclude or restrict deployment of other technologically feasible methods of "line sharing", including line sharing over the fiber-fed DLC configurations currently being constructed by Ameritech Illinois. Rhythms and Covad assert that it is clear from the *Line Sharing Order* that the FCC intended that its rules would be applied in a manner that would encourage competition and encompass new technologies and technological innovation to the fullest extent. Rhythms and Covad assert that the FCC set forth the baseline framework for line sharing in the *Line Sharing Order*, and charged the states with the task of establishing additional requirements necessary to achieve the pro-competitive goals of the Act.

With respect to state law, Rhythms and Covad assert that Section 13-505.6 of the Public Utilities Act authorizes the Commission to impose unbundling requirements that exceed those set by the FCC:

A telecommunications carrier that provides both noncompetitive and competitive telecommunications services shall provide all noncompetitive telecommunications services on an unbundled basis to the same extent the Federal Communications Commission requires that carrier to unbundle the same services provided under its jurisdiction. The Illinois Commerce Commission may require additional unbundling of noncompetitive telecommunications services over which it has jurisdiction based on a determination, after notice and hearing, that additional unbundling is in the public interest and is consistent with the policy goals and other provisions of this Act.

220 ILCS 5/13-505.6.

Rhythms and Covad argue that the FCC's recent *Project Pronto Order* does not alter the Commission's authority to identify new UNEs and has no impact on this Commission's analysis for two reasons. First, Rhythms and Covad assert that the FCC's *Project Pronto Order* was limited in scope and addressed only whether a waiver from the SBC-Ameritech merger conditions was appropriate. Rhythms and Covad claim that the FCC's *Project Pronto Order* considered only one issue: Could SBC, rather than its separate data affiliates, own DSLAMs in the form of ADLU cards, and packet switches in the form of OCDs. The FCC found a waiver would be necessary and granted the request regarding ownership of ADLU cards and OCDs. *Id.* Rhythms and Covad claim that the Order dealt only with the issue of Ameritech Illinois ownership of certain advanced services equipment otherwise prohibited by the *Merger Order*. *Id.* ¶ 1. The Waiver Order did not address the issue of whether line sharing should be permitted over the Project Pronto architecture, or whether Project Pronto components should be made available as UNEs. The Waiver Order was strictly limited to the issue of SBC/Ameritech ownership of certain advanced services equipment (*i.e.*, ADLU cards and Optical Concentration Devices ("OCDs") otherwise prohibited by the Merger Order. Rhythms and Covad note that the FCC expressly indicated throughout the Waiver Order that it was not intended to affect other interconnection and unbundling requirements imposed upon SBC and Ameritech by statute or order. See, *e.g. id.*, ¶¶ 1, 2, 7, 8, 20, 25, 30. The FCC did not consider the issue of whether the ADLU cards and the OCDs can be properly classified as network elements subject to the unbundling requirements of section 251(c)(3)." *Id.* ¶ 20. Since the FCC explicitly declined to consider whether the ADLU card and the OCD should be unbundled, Rhythms and Covad argue that the FCC's Waiver Order can have no impact on the Commission's determination of that issue in this proceeding.

Second, the Waiver Order has no force past the time that SBC is allowed to reintegrate its advanced service affiliate within its incumbent local exchange carrier operation. The FCC's underlying Order allowing the SBC/Ameritech merger set forth a requirement for a separate affiliate as a condition of approval. Under those merger conditions, SBC/Ameritech was automatically allowed to discontinue the use of a separate affiliate at the latest 42 months after the date of the Merger Order. Memorandum Opinion and Order, CC Docket No. 98-141 (Rel. Oct. 8, 1999), Appendix C, ¶ 12 ("Merger Order"). Further, on January 9, 2001, the U.S. District Court of Appeals for the District of Columbia issued a decision vacating the FCC's order approving the Merger Order. The Court's decision was based upon a finding that requiring the establishment of a separate affiliate to provide advanced services was unlawful, where the affiliate was not required to make the advanced services available for resale. *Association of Communications Enterprises v. FCC*, U.S. Court of Appeals, D.C. Circuit, No. 99-1441 (Jan. 9, 2001), vacating the Merger Order. Because the Merger Order, which established the very conditions from which SBC sought a waiver, has been vacated, the Waiver Order may no longer be effective either. F.R.C.P. 60(b)(5) states that relief from a judgment or an order may be granted where a prior judgment upon which it is based has been vacated.

Thus, for two independent reasons the continuing requirement for a separate affiliate is in question, and, according to Rhythms and Covad, the Commission must analyze this issue as though the requirement is ineffective. SBC/Ameritech officials have already publicly announced that the continuation of a separate data affiliate is in doubt. Immediately following release of the court order, Jim Ellis, Senior Executive, Vice President and General Counsel of SBC Communications, issued a statement that SBC could now legally "reabsorb" the "separate [data] affiliate...back into the telephone company" and would "be looking at the option of bringing the separate subsidiary back into the telephone company." See January 9, 2001 SBC Press Release, Statement of Jim Ellis, Attachment B to Covad and Rhythms' initial brief. Further, during the oral argument on rehearing on January 18, 2001, counsel for Ameritech-IL acknowledged that SBC/Ameritech has the unfettered right to discontinue use of the separate affiliate.

Rhythms and Covad state that, in determining whether to create a new UNE, the Commission first must determine whether it is technically feasible for the incumbent ILEC to provide access to a network element on an unbundled basis. Once this determination is made, the Commission must apply either the "necessary" or "impair" standard, depending on whether an element is proprietary to the ILEC.

Rhythms and Covad argue that, because no one has argued that Project Pronto's components are proprietary, the Commission's prior determination that the "impair" standard of Section 251(d)(2)(b) must obtain on rehearing. Under federal law, an ILEC must provide access to a non-proprietary network element if failure to do so would "impair" the ability of a CLEC to provide the services it seeks to offer. See *UNE Remand Order*, ¶ 51. Rhythms and Covad state that, under the *UNE Remand Order*, if there is a material difference between the use of an element on an unbundled basis and use of available alternatives, and that difference would "impair" a competitive carrier's ability to provide service, the element should be identified as an unbundled network element. *Id.* at 51. Rhythms and Covad claim that, if Ameritech Illinois denies Rhythms and Covad's access to Project Pronto, it will materially diminish Rhythms and Covad's ability to provide the services they seek to offer.

Rhythms and Covad further state that in determining whether an alternative to the ILEC's network element is available in such a manner that a CLEC can be expected to actually provide service using the alternative, the Commission must consider "the extent to which these alternatives are available as a practical, economic, and operational matter" after examining the totality of the circumstances *UNE Remand Order*, ¶ 62 (referred to as the "materiality standard"). Rhythms and Covad point out that the factors the FCC recognized in its *UNE Remand Order* as addressing materiality include, but are not limited to:

The costs associated with alternatives, including the forward-looking costs of self-provisioning or purchasing, and fixed and sunk costs involved in self-provisioning; the different revenue –generating potential of